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THE CASE OF THE Duke of NORFOLK

Represented to the *SUPREME JUDICATURE* of the KINGDOME, the LORDS in PARLIAMENT.

Henry Frederick, late Earl of *Arrundel* by Deed in *March* 1647. Settles the Barony of *Grayſtock*, on the Marqueſs of *Dorcheſter*, and other Truſtees, to the uſe of himſelf and his Counteſs for their Lives, then limits to the Truſtees a Term of two Hundred Years, in truſt if *Thomas* his Eldeſt Son, or any iſſue male of his Body be living at the Commencement of the Term, to permit *Henry* and his Heirs Male, to receive the Rents and profits thereof until ſuch time, as by the Death of his Eldeſt Son *Thomas* without iſſue, Male, or leaving his Wife Privement Enſeint of a Son, or by Failure of iſſue Male, the Earldome of *Arrundel* deſcend to *Henry*, and that upon deſcent of the Earldome to *Henry*, the Truſtees ſhould permit *Charles* and the Heirs Males of his Body; and for want of ſuch iſſue *Edward* and the Heirs Males of his Body, and likewiſe *Francis* and *Bernard*, and the Heirs Males of their Bodies, and for want of ſuch iſſue the right Heirs of the ſaid *Henry Frederick*, to receive the Rents, and profits of the *Barony* during all the Term of two Hundred years, and then the Inheritance is limited to *Henry*, *Charles*, *Edward*, *Francis*, and *Bernard* ſucceſſively in Tayle Male, Remainder to the right Heirs of *Henry Frederick*.

Henry in 1675, having both the Truſt of the Term and the Freehold, and inheritance in him; ſuffers a Recovery, and bars all the Remainders, and notwithſtanding *Thomas* died in 1677. *Henry* continued in poſſeſſion of the *Barony* of *Grayſtock*.

Henry by the Marriage agreement between himſelf, and the Lady *Ann* Siſter to the Duke of *Beaufort* was to Settle the Mannors of *A.B.* and *C.* of about 5000. *l. per Annum* value on the iſſue male of that marriage; thoſe Lands being ſold, the now Duke of *Norfolk* being the Eldeſt iſſue male of that Marriage brought his Bill in 1679 againſt *Henry* his Father to have a recompence of thoſe Lands he ſhould have ſettled, and which he had ſold away.

Henry propoſeth in Lieu of thoſe Lands to ſettle the Barony of *Grayſtock* and other Lands on the now Duke, all not above the Value of one third of the Mannors that ſhould have been ſettled by his Mothers Marriage agreement.

Hereupon the now Duke adviſeth with Mr. Serjeant *Maynard*, Sir *William Jones*, and other eminent Councel, whether Mr. *Charles Howards* pretence to the Barony of *Grayſtock* were good or not? they all agree he had no Title to the Barony of *Grayſtock*, and thereupon the now Duke accepts a conveyance from his Father in 1680. in Lieu of what ſhould have come to him by his Mothers Marriage agreement, ſo that the now Duke, if Mr. *Charles Howard* be releaſed muſt be undoubtedly defrauded of the Benefit of his Mothers marriage Agreement, and this upon a compaſſionate preſumption that *Charles* his Father intended this Barony for him upon *Thomas* his Death without iſſue, and the Earldome *Arrundel* deſcending on *Henry*, though contrary to all rules of Law and Equity.

17 *Junii*, 34. *Car.* 2d. This being the Caſe, the ſame was heard by the late Lord Chancellor *Nottingham* aſſiſted by the Lord Chief Juſtice of the *Kings Bench*; the Lord Chief Juſtice of the Common Pleas, and the Lord Chief Baron of the Exchequer; the three Chief Judges agreed in an Unanimous opinion that the Limitation of the Truſt of the Term to *Charles* and the Heirs males of his Body after, the ſame was limited to *Henry* and the Heirs Males of his Body, and a dying without iſſue of *Thomas*, was void, and that the Limitation to *Henry*, and the Heirs Males of his Body carried the whole truſt of the Term; notwithſtanding the ſaid three Chief Judges Opinion the Lord Chancellor *Nottingham* upon his own ſingle Opinion decreed the Limitation to *Charles* good.

The now Duke of *Norfolk* brought his Bill of Reveiw to reverſe this decree to which Mr. *Charles Howard* put in a Plea and Demurrer, and the ſame coming to be argued before the now Lord Keeper, the Lord *Guilford*, he propoſed (that leaſt it might be thought he lay under ſome prejudice in this Cauſe, having delivered his Opinion formerly, that the Remainder to *Charles* was void) that a Caſe ſhould be made and the opinion of all the Judges taken in it, but that being rejected by Mr. *Charles Howards* Councel his Lordſhip proceeded to hear the Cauſe and reverſed the decree.

15 *Maii*. 35. *Car.* 2d.

It was agreed by all as well the Lord *Nottingham*, as all the reſt that heard this Cauſe, that a Term cannot be limited to go in ſucceſſion from one, and Heirs Males of his Body, to another, and the Heirs Males of his Body, but my Lord Chancellor *Nottingham* inſiſted that the Contingency of the Earldome of *Arrundel* coming to *Henry* being to happen within a Life, that therefore that Limitation was good.

The Lord Keeper, and the Lords, the Judges, inſiſted, that limitation to *Charles* was void of a Term, it not being to take effect till the Death of *Thomas* without iſſue; and the Truſt being in the mean time limited to *Henry*, and the Heirs Males of his Body was a total diſpoſition of the Truſt of the Term, and for this they relyed on the Authority of *Child* and *Baylies* Caſe adjudged in the Court of Kings Bench, *Hill.* 15° *Jac.* 1. and afterwards affirmed in a Writ of Error; ſo that the Caſe was adjudged by ten of the twelve Judges. The Caſe is this, a Term of ſeventy years is deviſed to *Dorothy* for Life, then to *William* and his aſſignes, provided if *William* dye, without iſſue then living, then to *Thomas* another Son of the Deviſors, the Limitation over to *Thomas* in that Caſe was to happen within a Life as in our Caſe, by the dying of *William* without iſſue in the Life time of *Thomas*, yet there the Limitation being not to *Thomas* till the dying of *William* without iſſue, it was held void, becauſe in intendment of Law that was a Limitation perpetual. This Caſe the Lord Chancellor ſaith went on ſeveral reaſons not to be found in our Caſe, and then inſtanceth five.

1. William *having the Term to him and his Aſſigns there could be no Remainder to* Thomas. If ſo *Henry* in our Caſe had the term to him and his Heirs; *Ergo*, there could be no remainder to *Charles*.

2. Dorothy *there aſſented and granted to* William, *that was by Will, and an aſſent is there neceſſary*; Ours is by Deed, and needs no aſſent.

3. William *might have aſſigned his intereſt, and then no Remainder could take place*: *Henry* in our Caſe did abſolutely deſtroy the Remainder.

4. William *might have had iſſue, and that iſſue might have aſſigned.* In our Caſe *Thomas* might have had iſſue, and they might have ſurvived *Henry*.

5. *The main Reaſon, there was a further Limitation upon the death of* Thomas *without iſſue, to go to the Daughter, which was a plain affectation of a perpetuity to multiply contingencies.* In our Caſe there is four Limitations after the death of *Charles* (who is in the place of *Thomas* in the other Caſe.) *Viz.* To *Edward*, *Francis*, *Bernard*, and their reſpective Heirs Males, and to the right Heirs of *Henry Frederick*; ſo ours is ſo much more an affectation of a perpetuity, as four is more than one, and in truth my Lord Chancellor was miſtaken in every one of the five inſtances, and the Lord Chancellor ſaid *Child* and *Bailies* Caſe is a ſingle authority, and had never any reſolution like it. That Caſe is cited in *Love* and *Windhams* Caſe and *Grigg* and *Hopkins* Caſe in *Siderfins* Reports, and is allowed to be good Law in each of thoſe Caſes, which allowance is equivalent to a new Judgment.

And now if this Court ſhall adjudge this Limitation to *Charles* good, you will deſtroy the former Rules of Law, and yet can never carry this Limitation according to the intent of the ſaid *Henry Frederick* to each of his Sons, and their Heirs males, and the now Duke of *Norfolk* will be utterly defeated of all the recompence of his Mothers marriage Agreement.